No. 47547-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Chase Devyver,

Appellant.

Pierce County Superior Court Cause No. 14-1-00260-4

The Honorable Judge K.A. van Doorninck

Appellant's Reply Brief

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ARGUMENT

I. PRIOR TO DELIBERATIONS, THE JURY DISCOVERED THAT MR. DEVYVER WAS BEING TRIED UNDER GUARD.

A. The trial judge's failure to shield jurors from security measures violated due process and equal protection.

1. The error requires reversal because it conveyed the message that Mr. Devyver was dangerous or untrustworthy.

An accused person is entitled to appear in court without "manifestations that he is being held in jail." *State v. Gonzalez*, 129 Wn. App. 895, 897, 120 P.3d 645 (2005). Judges must shield jurors from routine security measures. *Id.*, at 901. Jurors should not learn that a defendant is "being tried under guard." *Id.*

At least some jurors in this case discovered that Mr. Devyver was being tried "under guard." *Id.* Two uniformed officers remained "within pretty close proximity" of Mr. Devyver during "every moment" of the trial. RP 133-134. Some jurors saw these same two deputies guarding Mr. Devyver in a small room adjoining the courtroom during a recess.[1] RP 128-134.

This was improper, absent a clear showing that he posed "an immediate threat to the peace and order of the trial." *Dorman v. United*

[1] One of these jurors even interacted with the deputy standing guard in the small room. RP 133.

States, 435 F.2d 385, 398 (D.C. Cir. 1970). The error created the impression that Mr. Devyver was "dangerous or untrustworthy." *Kennedy v. Cardwell*, 487 F.2d 101, 108 (6th Cir. 1973); *see also Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).

The judge's failure to shield jurors from security measures violated Mr. Devyver's right to due process. *Gonzalez*, 129 Wn. App. at 897. It also violated equal protection: if Mr. Devyver had been wealthy enough to afford bail, jurors would never have seen the two uniformed deputies standing guard over him in the small room adjoining the courtroom. *Id.,* at 904.

The convictions must be reversed and the case remanded for a new trial. *Gonzalez*, 129 Wn. App. at 901-905.

2. The error is preserved by defense counsel's request for a mistrial.

Respondent erroneously contends that Mr. Devyver "never objected to the courtroom security arrangements." Brief of Respondent, p. 7. This is incorrect.

In fact, defense counsel requested a mistrial. RP 128-134. He did so after some jurors saw his client under guard in a small room adjoining the courtroom, accompanied by the same uniformed officers who remained "within pretty close proximity" of Mr. Devyver for "every

moment" of the trial. RP 128-134. This objection is sufficient to preserve the issue for review.

Mr. Devyver's argument on appeal is not that the officers' presence in the courtroom requires reversal. Instead, the constitutional violation occurred once jurors became aware that the officers were there to stand guard over Mr. Devyver, and not just to provide general courtroom security. *See* Appellant's Opening Brief, pp. 9-15.

Furthermore, the trial court "could have corrected the error" given what it knew at the time. *State v. O'Hara,* 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010). Thus, even if Mr. Devyver's request for a mistrial were insufficient to preserve both the due process and equal protection arguments, both claims are available for review under RAP 2.5(a)(3).

B. This court should exercise its supervisory authority to prohibit juries from learning that an accused person is being tried under guard except in extraordinary cases.

The Supreme Court will exercise supervisory authority over trial courts when required by "sound judicial practice." *State v. Bennett*, 161 Wn.2d 303, 317-318, 165 P.3d 1241 (2007).

Respondent does not address the requirements of "sound judicial practice" in this case. Brief of Respondent, pp. 10-11. This failure may

be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Instead, Respondent erroneously contends that the Court of Appeals lacks supervisory authority over the trial courts. Brief of Respondent, pp. 10-11. This is incorrect.

By statute, the Court of Appeals has "all power and authority... necessary to carry into complete execution all of its judgments, decrees and determinations in all matters within its jurisdiction..." RCW 2.06.030. The sole exception is where appellate court action conflicts with rules of the supreme court. RCW 2.06.030.

Respondent does not identify any rule of the supreme court that is "inconsistent"[2] with the exercise of supervisory authority over the conduct of criminal trials in superior court. Brief of Respondent, pp. 10-11. Where no authority is cited, courts presume that counsel has found none after diligent search. *Linth v. Gay*, 190 Wn. App. 331, 339 n. 5, 360 P.3d 844 (2015).

This court should exercise supervisory authority to ensure that courtroom security "not be easily identifiable by jurors." *Holbrook,* 475 U.S. at 572. The *Holbrook* court's suggestion should be adopted in

[2] RCW 2.06.030.

Washington in the exercise of sound judicial practice. *See Bennett*, 161 Wn.2d at 317-318.

II. THE COURT'S INSTRUCTION ON VOLUNTARY INTOXICATION IMPROPERLY ALLOWED CONVICTION EVEN IF MR. DEVYVER LACKED THE MENTAL STATE REQUIRED FOR CONVICTION.

A. The court's inconsistent and misleading instruction was not manifestly clear.

Jury instructions must be manifestly clear. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). In this case, the court gave jurors an inconsistent and misleading instruction. It was not manifestly clear, even though it relayed statutory language. *See State v. Harris*, 122 Wn. App. 547, 553-554, 90 P.3d 1133 (2004) (noting that jurors lack interpretive tools).

The court necessarily found that Mr. Devyver's drinking affected his ability to acquire the mental state for each charge. *State v. Walters*, 162 Wn. App. 74, 82, 255 P.3d 835 (2011). Jurors were entitled to acquit if they found that his intoxication impaired his ability to acquire the necessary *mens rea*. *State v. Sao*, 156 Wn. App. 67, 76, 230 P.3d 277 (2010).

Instead of making this manifestly clear, the court instructed jurors that Mr. Devyver's acts were *not* "less criminal" by reason of his intoxication. CP 53. This is incorrect; his acts *were* "less criminal," if

intoxication interfered with his ability to form intent, knowledge, willfulness, or recklessness. *See Sao*, 156 Wn. App. at 76.

Respondent does not address the error identified in Mr. Devyver's Opening Brief. Instead, Respondent simply points out that the instruction tracks the language of the statute and has previously been approved. Brief of Respondent, p. 12 (citing *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987) and *State v. Hackett*, 64 Wn. App. 780, 787, 827 P.2d 1013 (1992)). Neither *Coates* nor *Hackett* addressed the error raised here. In *Coates,* the court discussed the burden of proof. *Coates*, 107 Wn.2d at 891. The *Hackett* court addressed the instruction's applicability to intoxicants other than alcohol. *Hackett*, 64 Wn. App. at 785. *Coates* and *Hackett* do not resolve the issue raised by Mr. Devyver.

The court's instructions violated due process and deprived Mr. Devyver of his right to present a defense. *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010). His convictions must be reversed. *Id.*

B. Defense counsel deprived Mr. Devyver of the effective assistance of counsel.

Mr. Devyver's trial theory was that intoxication prevented him from acquiring the required mental state. RP 757-770. He was denied the effective assistance of counsel when his attorney proposed an instruction

telling jurors that Mr. Devyver's actions were not "less criminal" by reason of intoxication. CP 9, 53.

Defense counsel had no valid strategic reason for proposing an instruction that negated the defense theory. *Kyllo*, 166 Wn.2d at 871. Furthermore, the error prejudiced Mr. Devyver, given that his theory of the case rested entirely on his intoxication.

Mr. Devyver's conviction must be reversed, and the case remanded for a new trial. *Id.*

C. The Court of Appeals should address the merits of Mr. Devyver's instructional error and ineffective assistance claims.

The invited error doctrine and the Supreme Court's *Studd* decision combine to allow a conviction to stand even when obtained in violation of the constitution. *See State v. Studd*, 137 Wn.2d 533, 555 *et seq.*, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 871 *et seq.*, 792 P.2d 514 (1990) (Utter, J., dissenting); *In re Griffith*, 102 Wn.2d 100, 103 *et seq.*, 683 P.2d 194 (1984). This outcome is fundamentally unfair. An accused person whose conviction stems from violation of constitutional rights should be granted a new trial.

Respondent does not address Mr. Devyver's argument regarding the unfairness created by application of the invited error doctrine and the

rule from *Studd.* Brief of Respondent, pp. 12-13. This failure should be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

The Court of Appeals should address the merits of Mr. Devyver's claim.

III. THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON SECOND-DEGREE MANSLAUGHTER.

A. The trial court violated Mr. Devyvyer's statutory right to the instructions.

Mr. Devyver had an "unqualified" statutory right to instructions on second-degree manslaughter. *State v. Parker,* 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984); RCW 10.61.003; RCW 10.61.010. Felony murder, as "charged and prosecuted"[3] by the state in this particular case, included all the elements of second-degree manslaughter. *See* Appellant's Opening Brief, pp. 25-32. Furthermore, at least "the slightest evidence" suggested that Mr. Devyver committed only manslaughter. *Parker,* 102 Wn.2d at 163-164; *see* Appellant's Opening Brief, pp. 32-33.

The trial court erroneously looked at the elements of murder and manslaughter "in isolation" rather than giving "due regard to their necessary relational nature." *State v. Gamble*, 154 Wn.2d 457, 466-467, 114 P.3d 646 (2005). This was error. *Id.*

[3] *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).

Had the court properly examined the elements with regard for their relational nature, it would have concluded that Mr. Devyver's intentional assault with a weapon "readily capable of causing death"[4] necessarily established that he knew of and disregarded "'a substantial risk that a [*homicide*] may occur.'" *Gamble*, 154 Wn.2d at 467 (alterations and emphasis provided in *Gamble*) (quoting RCW 9A.08.010(1)(c)). A person who intentionally assaults another with something "readily capable of causing death" necessarily risks the victim's death.

Thus, proof of felony murder, as "charged and prosecuted"[5] in this case necessarily established second-degree manslaughter. The trial court should have allowed Mr. Devyver to argue manslaughter to the jury. Its failure to do so violated Mr. Devyver's unqualified statutory right to the instructions. *Parker,* 102 Wn.2d at 163-164; RCW 10.61.003; RCW 10.61.010.

Respondent fails to adequately engage with Mr. Devyver's argument. Brief of Respondent, pp. 13-14. Instead of addressing the elements as charged and prosecuted in this particular case, Respondent cites to cases that have wrestled with other permutations of the issue. Brief of Respondent, p. 13 (citing cases).

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[4] CP 62.

[5] *Berlin*, 133 Wn.2d at 548.

Furthermore, all of the authority cited by Respondent predates *Gamble,* and thus did not apply the Supreme Court's admonition that the elements (as charged and prosecuted) be examined with "due regard [for] their necessary relational nature." *Gamble*, 154 Wn.2d at 466-467.

Even though felony murder doesn't require proof of intent to cause death, the combination of elements (as charged and prosecuted in this case) establishes a culpable mental state with respect to the probability of death. Felony murder based on assault with a deadly weapon necessarily establishes second-degree manslaughter. As charged and prosecuted, the elements of the greater offense, when viewed with due regard for their necessary relational nature, established the lesser offense. *Gamble* requires reversal in this case.[6]

The trial court erred by rejecting Mr. Devyver's proposed lesser-included offense instructions. His murder conviction must be reversed and the case remanded for a new trial. *Parker,* 102 Wn.2d at 163-164.

B. Defense counsel unreasonably made the wrong legal argument in support of the instructions on second-degree manslaughter.

Mr. Devyver rests on the argument set forth in the Opening Brief.

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[6] This is so even though the *Gamble* court reached a different conclusion regarding felony murder where the predicate felony is assault under RCW 9A.36.021(1)(a). *See* Appellant's Opening Brief, pp. 30-32.

IV. THE TRIAL JUDGE VIOLATED MR. DEVYVER'S STATE AND FEDERAL DUE PROCESS RIGHTS TO INSTRUCTIONS ON A LESSER-INCLUDED OFFENSE.

Mr. Devyver rests on the argument set forth in the Opening Brief.

V. THE "REASONABLE DOUBT" INSTRUCTION VIOLATED DUE PROCESS BY FOCUSING JURORS ON THE TRUTH.

It is error to tell jurors to search for "the truth." *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (addressing prosecutorial misconduct); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012) (same). The court equated proof beyond a reasonable doubt with an abiding belief in "*the truth of the charge.*" CP 49 (emphasis added). This was structural error, subject to automatic reversal. *Sullivan v. Louisiana,* 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

Without analysis, Division I has twice rejected a challenge to this language. *State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 *review denied,* 181 Wn.2d 1019, 337 P.3d 325 (2014); *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784 *review denied,* 181 Wn.2d 1009, 335 P.3d 941 (2014). This court should not follow Division I.

Both *Kinzle* and *Fedorov* erroneously rely on *Bennett*, 161 Wn.2d at 315-16. The *Bennett* decision does not support Division I's position.

In *Bennett,* the appellant argued *in favor of* WPIC 4.01 (the pattern instruction at issue here), and asked the court to invalidate the so-called

Castle instruction. *Bennett*, 161 Wn.2d at 308-309. The *Bennett* court was not asked to address any flaws in WPIC 4.01.[7] *Id.*

The *Fedorov* court also relied on *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In *Pirtle,* as in *Bennett,* the defendant favored the "truth of the charge" language. *Id.,* at 656 n. 3. The appellant challenged a different sentence (added by the trial judge) which inverted the language found in the pattern instruction. *Id.,* at 656.[8] The *Pirtle* court was not asked to rule on the constitutionality of the "truth of the charge" provision.

Neither *Bennett* nor *Pirtle* should control this case. Division II should not follow Division I's decisions in *Kinzle* and *Fedorov.*

Mr. Devyver's convictions must be reversed. The case must be remanded for a new trial with proper instructions. *Sullivan*, 508 U.S. at 281-82.

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[7] The *Bennett* court upheld the *Castle* instruction, but exercised its supervisory authority to instruct courts not to use it, and to use WPIC 4.01 instead. *Id.,* at 318.

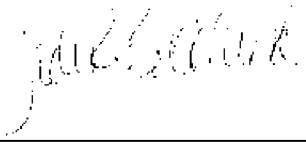
[8] The challenged language in *Pirtle* read as follows: "If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt." *Pirtle*, 127 Wn.2d at 656. The appellant argued that the instruction "invite[d] the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit." *Id.,* at 656.

CONCLUSION

For the foregoing reasons, Mr. Devyver's convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on March 2, 2016,

BACKLUND AND MISTRY



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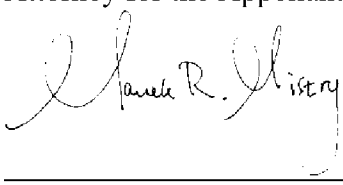

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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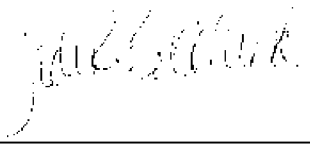

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